

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARTHA BROWN,)	
)	
Plaintiff,)	CASE NO. C05-1253-MJB ¹
)	
v.)	MEMORANDUM OPINION
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Martha Brown appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (the “Commissioner”) denying her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) from 1999 to September 1, 2002 under Titles II and XVI of the Social Security Act.² For the reasons set forth below, the Commissioner’s decision shall be AFFIRMED.

I. PROCEDURAL HISTORY

Plaintiff filed for DIB on February 3, 1999. (Tr. 116). Plaintiff alleged that she had been disabled since May 17, 1997, due to arthritis in her hands, wrists and feet. *Id.* Plaintiff filed for

¹ Pursuant to the consent of the parties, this case has been referred to the undersigned in accordance with 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13.

² Plaintiff was previously awarded disability benefits as of September 1, 2002. (Tr. 354, 404-05).

1 SSI on July 13, 1999. (Tr. 299-302). Plaintiff's DIB and SSI applications were denied initially
2 and on reconsideration. (Tr. 80-88, 306-08). A hearing was held before administrative law
3 judge ("ALJ") Edward Nichols on July 6, 2000. (Tr. 46-75). Plaintiff, represented by counsel,
4 testified at the hearing. (Tr. 49-72). Plaintiff's daughter, Danielle Stark, and vocational expert
5 John Fountaine also testified at the hearing. (Tr. 69-74). On September 11, 2000, the ALJ issued
6 a decision finding Plaintiff was not disabled at step five because she has the residual functional
7 capacity ("RFC") to perform a significant range of light work. (Tr. 14-35). Plaintiff's request
8 for review by the Appeals Council was denied. (Tr. 8-9).

9 Plaintiff subsequently sought judicial review in District Court (Case No. C02-2328Z).
10 United States Magistrate Judge Monica J. Benton issued a Report and Recommendation to
11 remand Plaintiff's case for further proceedings to: 1) reevaluate Plaintiff's impairments at step
12 two to determine whether Plaintiff's depression, individually or in combination with other
13 physical impairments, constitutes a severe impairment; 2) consider whether Plaintiff's severe
14 impairments render her disabled; and 3) reevaluate Plaintiff's RFC. (Tr. 337-350). On March
15 15, 2004, the District Court adopted Magistrate Judge Benton's Report and Recommendation.
16 (Tr. 335). Pursuant to the Order of Remand, the Appeals Council sent Plaintiff's back to the
17 Office of Hearings and Appeals. (Tr. 351-52).

18 A supplemental hearing was conducted before ALJ Nichols on August 17, 2004. (Tr.
19 400-410). Plaintiff, who was not represented by counsel, testified at the hearing. (Tr. 400-410).
20 Vocational Expert ("VE") Brian Sorensen, while present at the hearing, did not testify. (Tr. 400-
21 410). Plaintiff was instructed by ALJ Nichols to return when represented by counsel. (Tr. 407-
22 09). A second supplemental hearing was conducted on November 19, 2004. (Tr. 411-29).
23 Plaintiff, represented by counsel, testified at the hearing. (Tr. 411-424). VE Neil Bennett also
24 testified at the hearing. (Tr. 424-29). On January 7, 2005, the ALJ issued a decision finding

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1 Plaintiff was not disabled as step five because she has the RFC to perform a range of light work.
2 (Tr. 328-334). Plaintiff's request for review by the Appeals Council was denied, making the
3 ALJ's decision the final decision of the Commissioner. (Tr. 320-22). Plaintiff now seeks judicial
4 review in this Court.

5 II. THE PARTIES' POSITIONS

6 Plaintiff requests that the Court reverse the Commissioner's decision and remand the case
7 for further proceedings to develop the record about Plaintiff's depression with a pain disorder.
8 (Dkt. #14 at 9 - Plaintiff's Opening Brief). Plaintiff argues that the ALJ erred by failing to order
9 a psychological assessment concerning Plaintiff's depression or order supplemental information
10 from Plaintiff's physician in order to properly assess her mental impairments. (Dkt. #14 at 4).

11 The Commissioner requests that the ALJ's decision be affirmed because it is supported
12 by substantial evidence in the record and free from legal error. (Dkt. #15 at 6 - Defendant's
13 Brief). The Commissioner argues that the ALJ properly reconsidered Plaintiff's depression and
14 that Plaintiff's new evidence documenting treatment for depression is inapplicable. (Dkt. #15 at
15 5).

16 III. STANDARD OF REVIEW

17 The Court may set aside the Commissioner's denial of social security disability benefits
18 when the ALJ's findings are based on legal error or not supported by substantial evidence in the
19 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is
20 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence
21 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,
22 881 F.2d 747, 750 (9th Cir. 1989). Where the evidence is susceptible to more than one rational
23 //
24 interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*,

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694 F.2d 639, 642 (9th Cir. 1982).

IV. EVALUATING DISABILITY

The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

The Social Security regulations set out a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 416.920. At step one, the claimant must establish that he or she is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant must establish that he or she has one or more medically severe impairments or combination of impairments. If the claimant does not have a “severe” impairment, he or she is not disabled. *Id.* at § (c). At step three, the Commissioner will determine whether the claimant’s impairment meets or equals any of the listed impairments described in the regulations. A claimant who meets one of the listings is disabled. *See Id.* at § (d).

At step four, if the claimant’s impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner evaluates the claimant’s residual functional capacity and the physical and mental demands of the claimant’s past relevant work. *Id.* at §§ (e), (f). If the claimant is not able to perform his or her past relevant work, the burden shifts to the Commissioner at step five to show that the claimant can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant’s residual functional capacity, age, education, and work experience. *Id.* at § (g)(1); *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner finds the claimant is unable to perform

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1 other work, then the claimant is found disabled.

2 V. SUMMARY OF THE RECORD

3 Plaintiff was forty-five (45) years old on the alleged onset date and fifty-two (52) years
4 old at the time the ALJ issued the most recent decision. (Tr. 49, 328-334). Plaintiff has a high
5 school education. (Tr. 49-50). Plaintiff's prior work experience included work as a seafood
6 clerk and a produce clerk. (Tr. 117). The evidence relevant to Plaintiff's allegations of disability
7 is incorporated in the discussion below.

8 VI. THE ALJ'S DECISION

9 At step one, the ALJ determined that Plaintiff has not engaged in substantial gainful
10 activity since the onset of her alleged disability. (Tr. 333). At step two, the ALJ determined that
11 Plaintiff's depression is a severe impairment. *Id.* At step three, the ALJ determined that
12 Plaintiff's sufficiently severe impairments did not meet or equal any of the impairment listings
13 under the federal regulations. *Id.* At step four, the ALJ evaluated Plaintiff's RFC and
14 determined that, while she could perform light exertional activities, Plaintiff was not able to
15 perform any past relevant work. *Id.* At step five, the ALJ determined that Plaintiff could engage
16 in other types of gainful work that exist in the national economy. (Tr. 333-34). The ALJ
17 concluded that Plaintiff is not entitled to DIB benefits and is not eligible for SSI payments.

18 VII. DISCUSSION

19 A. The ALJ's duty to develop the record

20 Plaintiff contends that the ALJ erred by failing to properly develop the record when he
21 was ordered to reconsider Plaintiff's depression by this Court. (Dkt. #14 at 4). Specifically,
22 Plaintiff points to the ALJ's: 1) duty to fully and fairly develop the record, 2) failure to further
23 develop the record about Plaintiff's depression with a pain disorder, and 3) failure to follow this
24 Court's Order to reassess Plaintiff's mental impairments. (Dkt. #14 at 4, 6, 7). The

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1 Commissioner contends that the ALJ was not required by this Court to obtain supplemental
2 evidence and that the ALJ properly reconsidered Plaintiff's depression. (Dkt. #15 at 4, 5).

3 The ALJ has a special duty to develop the record fully and fairly and to ensure that the
4 claimant's interests are considered, even when the claimant is represented by counsel.
5 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). An ALJ's duty to "conduct an
6 appropriate inquiry" is triggered when there is ambiguous evidence or upon the ALJ's own
7 finding that the record is inadequate to allow for proper evaluation of the evidence. *Id.* (internal
8 citations omitted).

9 In the present matter, although Plaintiff contends that the ALJ erred by failing to
10 adequately consider Plaintiff's depression, the record shows that the ALJ, on remand, assumed
11 that Plaintiff's depression was a severe impairment.³ (Dkt. #14 at 6; Tr. 331). Further, the ALJ
12 noted that no further documentary evidence was produced at the supplemental hearing to
13 support a claim based on depression. Tr. 331. Moreover, despite the ALJ's assumption, he also
14 questioned Plaintiff about her depression to "allow her to provide additional evidence if
15 possible." *Id.* Specifically, the ALJ asked Plaintiff why she never sought treatment for her
16 depression. *Id.* The ALJ rejected Plaintiff's answer that she was a "veritable recluse" because in
17 the portion of the ALJ's prior decision that was accepted by this Court, he had found that
18 Plaintiff was not a recluse. *Id.* Therefore, the ALJ concluded that if Plaintiff had wanted or felt
19 the need for treatment for her depression, she could have obtained it. *Id.*

20 The record also reflects that the ALJ properly took Plaintiff's severe depression into
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22 ³ Indeed, the ALJ misinterpreted the Magistrate Judge's Report and Recommendation when he stated that
23 "the Magistrate Judge [sic] that depression should be considered a 'severe impairment' and analyzed
24 accordingly." Tr. 330. In fact, in the Report and Recommendation the Magistrate Judge found that the
25 record contained objective medical evidence of Plaintiff's depression and thus, the ALJ erred in rejecting
26 depression as one of Plaintiff's medically determinable impairments. (Tr. 342-43). The Court instructed
the ALJ to consider, on remand, whether Plaintiff's depression, individually or in combination with her
other physical impairments, constituted a severe impairment. (Tr. 350).

1 account in the remainder of his disability determination. At the November 19 supplemental
2 hearing, the ALJ asked the vocational expert Neil Bennett to consider whether an individual who
3 had multiple foot surgeries, hepatitis C, degenerative joint disease, and depression can participate
4 in any past relevant work. (Tr. 424-25). Based upon Mr. Bennett's answers, the ALJ concluded
5 that Plaintiff would be unable to return to her past relevant work because of both her physical
6 limitations and her depression. (Tr. 332). However, Mr. Bennett went on to say that an
7 individual with the same impairments could find work as an appointment clerk. (Tr. 426-27).
8 After ascertaining that there are over 8,000 appointment clerk positions in King County alone,
9 the ALJ determined that, despite both her physical limitations and depression, Plaintiff was
10 nevertheless able to engage in other types of gainful work that exist in the national economy.
11 (Tr. 333-34). Accordingly, the Court concludes that it is unnecessary to remand the case to
12 further develop the record on this point.

13 B. New Evidence

14 Plaintiff contends that a sentence six remand is appropriate to consider Dr. McCoy's
15 treatment notes documenting Plaintiff's depression from July 23, 2002 to August 9, 2005. (Dkt.
16 #14 at 8). Plaintiff argues that, even though these treatment notes document Plaintiff's
17 depression after the contested disability period disability, they are still relevant. (Dkt. #14 at 8).
18 The Commissioner contends that these notes are irrelevant because they relate to treatment
19 received after the contested disability period. (Dkt. #15 at 5). The Commissioner supports her
20 position by arguing that after-the-fact psychiatric diagnoses are notoriously unreliable. (Dkt. #15
21 at 6).

22 In determining whether to remand a case to the ALJ in light of new evidence, "the Court
23 examines both whether the new evidence is material to a disability determination and whether a
24 claimant has shown good cause for having failed to present the new evidence to the ALJ earlier.

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1 *Mayes v. Massanari*, 262 F.3d 453, 462 (9th Cir. 2001). To be material to a disability
2 determination, Plaintiff must show that there is a “reasonable possibility” that the new evidence
3 would have changed the outcome of the administrative hearings. *Mayes*, 262 F.3d at 46, *citing*,
4 *Booz v. Secretary of Health and Human Services*, 734 F.2d 1378, 1380-81 (9th Cir. 1983). To
5 demonstrate good cause, the claimant must demonstrate that the new evidence was unavailable
6 earlier. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985).

7 Dr. McCoy’s treatment records confirm that Plaintiff suffers from depression. (Dkt. #16
8 at 5 – Plaintiff’s Reply Brief). However, Dr. McCoy’s treatment records are not material to a
9 disability determination in this case because the ALJ already assumed Plaintiff’s depression was a
10 severe impairment. Furthermore, even if Dr. McCoy’s treatment records were material, Plaintiff
11 has not shown good cause for having failed to present these records to the ALJ earlier. At the
12 supplemental hearing on November 19, 2004, Plaintiff was given the opportunity to present
13 additional treatment records to the ALJ. The ALJ specifically asked Plaintiff’s attorney if there
14 was any additional documentary evidence pertaining to the period in question, to which the
15 attorney replied “No.” (Tr. 414). At that time, however, given Plaintiff’s testimony that she
16 started seeing a therapist for her depression in 2002 (Tr. 416), there should have been over two
17 years of treatment records that could have been submitted to the ALJ. (Tr. 416). Presently, the
18 only effort at explaining the failure to submit Dr. McCoy’s records to the ALJ earlier is the
19 following statement in Plaintiff’s Opening Brief: “It is not clear why the records were not
20 provided to the ALJ other than *the possibility* that Mrs. Brown did not have the funds to pay for
21 the records and the ALJ made no effort to obtain such copies through the SSA.” (Dkt. #14 at 9)
22 (emphasis added). This statement is speculative and does not establish “good cause.” *Id.* Thus,
23 this Court concludes that a sentence six remand to the ALJ on the basis of new evidence is
24 inappropriate because Plaintiff has not shown good cause for failing to submit Dr. McCoy’s
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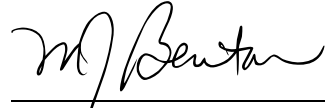
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1 treatment records at the November 19 supplemental hearing.

2 VIII. CONCLUSION

3 Based on the foregoing, the Court finds that the Commissioner's decision denying
4 Plaintiff's applications for DIB and SSI benefits is supported by substantial evidence and is free
5 of legal error. Therefore, this Court AFFIRMS the Commissioner's decision.

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7 DATED this 28th day of June, 2006.

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11 MONICA J. BENTON
12 United States Magistrate Judge
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